



DATE: December 10, 2018

TO: Members of the Rental Housing Committee

FROM: Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
Justin D. Bigelow, Special Counsel to the Rental Housing Committee
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SUBJECT: Appeal of Decision Re: Petition 17180015

RECOMMENDATION

Consider the proposed* appeal decision and either accept the proposed appeal decision or modify the proposed appeal decision with instructions to staff citing appropriate evidence in the record.

BACKGROUND

This is the third appeal of a decision regarding a petition for upward adjustment of rent to be heard by the Rental Housing Committee (RHC). A relevant timeline is included below for your reference.

Table 1 Relevant Timeline

<u>Date</u>	<u>Action</u>
Apr 12, 2018	Respondent-Landlord submits petition for upward adjustment (Petition)
May 9, 2018	Petition accepted
Jul 27, 2018	Pre-Hearing Settlement Conference held (resulting in one settlement)
Sep 13, 2018	Hearing held, at conclusion Hearing Officer allowed for additional submissions from all parties, leaving the record open
Oct 3, 2018	The hearing record was closed
Nov 6, 2018	Decision distributed to all parties
Nov 16, 2018	Appeal submitted by Appellant-Tenant
Dec. 10, 2018	Appeal hearing before RHC

* Regulation Chapter 5, Section H.3 does not require publication of tentative appeal decisions. However, if a tentative appeal decision is published, it must be distributed to the parties at least ten calendar days prior to a hearing before the Rental Housing Committee. The draft appeal decision in this case was not distributed at least ten days prior to the hearing and so it is referred to as a "proposed appeal decision" for clarity.

Respondent-Landlord submitted a petition for upward adjustment of rent applicable to seven of seven units in order to maintain Respondent-Landlord's net operating income as earned in 2015. The hearing officer's decision granted an upward adjustment for Respondent-Landlord based on the MNOI formula.

Appellant-Tenant appealed one element of the decision: the application of the definition of "Consumer Price Index" as the Consumer Price Index - All Urban Consumers for "Rent of primary residence" (CPI-RPR) for purposes of the Petition.

ANALYSIS

A. Role of the RHC

The role of the RHC is not to re-weigh evidence submitted in support of or opposition to the Petition, unless the RHC chooses to hear the appeal "*de novo*" pursuant to Regulation Chapter 5, Section H.5.a. *De novo* review would require the RHC to open the hearing record and hold a new, formal hearing. Staff does not recommend *de novo* review for this appeal. Thus, the RHC's role will be to determine whether the appealed element of the hearing officer's conclusions in the decision are supported by substantial evidence. This process mimics a trial court and appeal court: the trial court drafts a decision after weighing all the evidence and the appeal court reviews the decision to verify whether the decision was adequate.

Legally, reviewing whether substantial evidence exists to support an appealed element of the decision simply means that there is adequate information in the record to support the decision. Stated differently, substantial evidence means that a reasonable person reviewing the evidence could have reached the same decision. Substantial evidence does not mean that RHC members (or RHC staff or special counsel) would have reached the same conclusion if they were present for every aspect of the hearing.

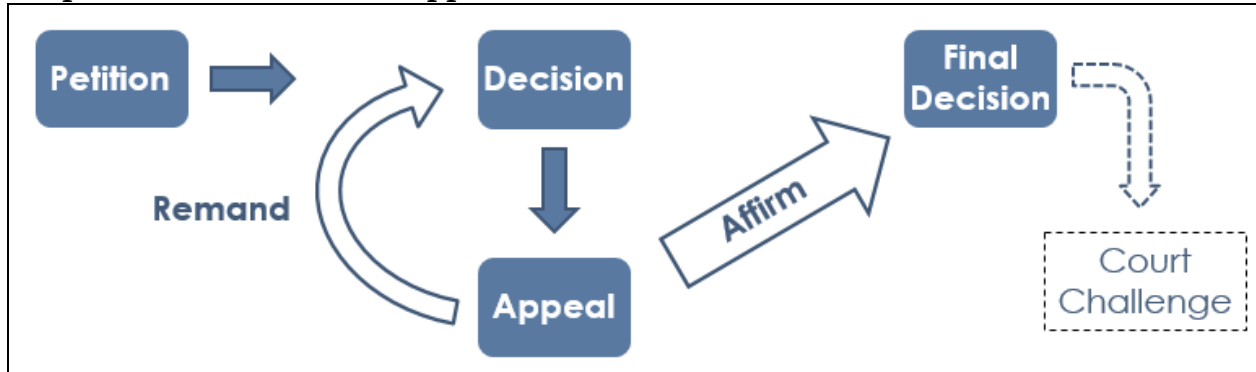
B. Review: Affirming and/or Remanding the Appealed Element of the Decision

Petitions define the scope of information hearing officers review. Appeals define the scope of information the RHC reviews.

Likewise, the proposed appeal decision reviews only the appealed element of the decision, and determines whether or not there is substantial evidence to support (affirm) the hearing officer's decision. Elements of the decision that were not appealed by either party are considered final and not subject to RHC review. If substantial evidence to support the decision is not identified in the decision, or if substantial evidence is not readily apparent by reviewing the record presented to the hearing

officer, then that element of the decision is remanded so the hearing officer can "show the work:" describing how and why the conclusion was reached. A summary graphic visualizing the appeal procedure is provided below.

Graphic 1 Visualization of Appeal Procedure



The proposed appeal decision recommends affirming the one appealed element. As shown above, if the RHC remands the appealed element to the hearing officer, the hearing officer will revise the decision and provide it to the parties. Importantly, the hearing officer can only revise parts of the decision subject to remand and parties to the Petition can only appeal revised parts of the decision to the RHC. In this way, there could be multiple appeals to the RHC of the same Petition, but the elements subject of the appeal will likely narrow each time.

C. Appeal Element

Appellant-Tenant argues that the use of the CPI-RPR is inappropriate and specifically requests: "RHC needs to revisit this unreasonable policy" (Appeal Form). As discussed in the proposed appeal decision, an appeal to the Rental Housing Committee (RHC) regarding the validity of regulations adopted by the RHC are improper and denied. The proposed appeal decision also verifies that the CPI-RPR values and calculations are supported by substantial evidence and, accordingly, proposes that the RHC **affirm** the hearing officer's decision.

D. Appeal Hearing Procedure

Each party to the appeal will have an opportunity to present their arguments to the RHC and respond to the other party's presentation. As noted above, the parties are not to present new evidence. Likewise, the public may provide comment to the RHC before it hears any appeals (Gov. § 54954.3(a)). Finally, RHC members may have questions for staff and/or the parties. The following schedule for the appeal hearing is proposed to facilitate the orderly participation of all parties.

Agenda Item 5.1 Appeal(s) of Hearing Officer Decision(s)

- Public Comment Period applicable for all Appeals on the agenda

Appeal Hearing (CSFRA Case 17180015)	
Staff Report & Presentation	
Appellant Presentation of Argument	10 minute maximum
Respondent Presentation of Argument	10 minute maximum
Appellant Presentation of Rebuttal	5 minute maximum
Respondent Presentation of Rebuttal	5 minute maximum
RHC Question and Answer with Staff	
RHC Question and Answer with Appellant	
RHC Question and Answer with Respondent	
RHC Deliberations and Decision	

Conclude Agenda Item

FISCAL IMPACT

Adoption of the proposed appeal decision, as drafted, could potentially lead to litigation, which would have fiscal impacts. Notably, one purpose of appealing a hearing officer decision to the RHC (as opposed to directly appealing to the courts) is to ensure that decisions are legally defensible, and so the appeal process to the RHC reduces the overall risk of legal liability and litigation expenses. As discussed above, the proposed appeal decision recommends affirming the hearing officer's decision, in which case the decision would be considered a final ruling and could be challenged in court.

PUBLIC NOTICING – Agenda posting

ATTACHMENTS

1. Proposed Appeal Decision (17180015)